STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 29, 2010
v	No. 289955 Berrien Circuit Court
FELIX MANUEL AMPARO, Defendant-Appellant.	LC No. 2008-411349-FH

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of resisting or obstructing a police officer, MCL 750.81d(1), and one count of disturbing the peace, MCL 750.170. Because the trial court properly excluded a letter regarding defendant's good character as hearsay at trial, properly excluded defendant's testimony regarding what his doctor told him as hearsay evidence, and defense counsel was not ineffective declining to present an involuntary intoxication defense, we affirm.

On Saturday, May 17, 2008, at 5:45 a.m., defendant arrived at the emergency room of Lakeland Hospital in Niles, Michigan. Defendant complained of back, neck, shoulder, and arm pain from a 2004 injury. Defendant stated that he had filled his prescriptions for Flexeril and Oxycodone on April 30, 2008, but that he had since run out. Dr. Patrick Holbert briefly examined defendant and prescribed both a 60 milligram injection of Toradol (a non-narcotic anti-inflammatory pain medication) and a five milligram injection of Diazepam (a/k/a Valium). Hospital nursing staff administered the medications to defendant at 6:26 a.m. At 6:40 a.m., defendant did not indicate any relief from the medications and still rated his pain level at ten out of ten. Less than ten minutes later, at 6:48 a.m., on Dr. Holbert's order, defendant received an additional injection of one milligram of Dilaudid (a narcotic). By 7:30 a.m., defendant had indicated some relief and rated his shoulder pain as four out of ten. On hearing about defendant's improvement, Dr. Holbert approved defendant's discharge. Dr. Holbert stated that on defendant's discharge, defendant was not under the influence of narcotics because the doses he received were so small based on defendant's size, defendant did not have pinpoint pupils, his breathing was not slow, his speech was not slurred, and his motor skills were not affected.

Nurse Kristin Geideman informed defendant that Dr. Holbert was pleased with his pain level improvement and that he was being discharged with a prescription for Vicodin to take as needed for pain management. Defendant got very upset and became agitated and told Geideman

that Vicodin was not going to help his pain and was adamant about seeing the doctor and getting a prescription for Oxycontin. Geideman told defendant that Oxycontin is not a drug prescribed through the emergency room. According to Geideman, defendant's voice got extremely loud, he began swearing, and stood up and threw the prescription down on the bed and refused to leave until he received a prescription for Oxycontin. Defendant told Geideman that, "I'll just end up f'ing killing myself and the f'ing doctor. I'll come back and f'ing kill everyone." Dr. Holbert came to the doorway of defendant's room and told defendant he was not going to give him a prescription for Oxycontin and then stated that they should call the police. Hospital staff called the police and also notified the hospital maintenance department which acts as security when the hospital does not have a security guard present. Defendant left the emergency room and walked to the hospital lobby.

Robert Gold, maintenance and security personnel, responded to the call. Gold watched defendant walk to the hospital lobby and watched him until the police arrived. Officers Jim Kidwell and Michael Stanton of the Niles City Police Department were dispatched to the hospital at approximately 7:30 a.m. Both officers were wearing police uniforms. Kidwell arrived at the hospital emergency room within two to three minutes. Dr. Holbert met Kidwell and told him that defendant had threatened to kill him, a nurse, and others, and that he was going to go home and get a weapon. Geideman directed Kidwell down a long hall to the main entrance of the hospital where defendant was sitting on a ledge near the door.

While it appeared to Kidwell as he approached defendant that defendant was talking on a cell phone, as Kidwell got closer he realized that defendant was not talking on the phone. Kidwell paused for a moment and asked defendant to put the phone down so Kidwell could talk to defendant. Defendant did not comply, so Kidwell asked him once more, then the third time Kidwell told him to put the phone down. Defendant then put the phone in his pocket. Defendant had a small red canvas or soft-sided bag on his lap. Kidwell asked him what the problem was and defendant, staring at the floor, did not answer. Kidwell asked him again and defendant responded, in a loud and agitated manner, "[t]he damned doctor won't give me my fucking pills."

Kidwell asked defendant to stand up, but defendant did not, and then placed his hand as though he was going to put it into the red bag. Not knowing what was in the red bag, Kidwell immediately put his hand on top of defendant's hand before defendant removed his hand from the bag. Defendant pulled his arm back and said, "[g]et your damn hand off me." Kidwell grabbed a hold of defendant's arm, asked him to stand up, and asked him if he had any weapons on his person. Defendant did not respond and did not stand up. Kidwell felt defendant pulling his arm away so Kidwell helped defendant to his feet, placed defendant's hands up against a window, and took control of defendant's back. As Kidwell was stepping away from defendant, defendant began screaming, yelling, and causing a commotion. Defendant was complaining about the prescription that the doctor would not prescribe. Kidwell told defendant that he was under arrest for disturbing the peace.

Kidwell caught a glimpse of defendant making a fist with his right hand. Kidwell was off to defendant's side and tried to duck, but defendant swung and caught Kidwell in the temple knocking him back a couple steps. Stanton was walking down the hallway toward them and saw defendant punch Kidwell in the left temple with his right hand. Stanton ran toward defendant and crashed into him to stop further assault. Stanton tried to get defendant to the ground but he

resisted and started hitting Stanton. Kidwell indicated that he had his taser drawn and Stanton disengaged so Kidwell could deploy it. Kidwell's taser malfunctioned and did not deploy. Stanton then drew his taser and told defendant to get on the ground several times. When defendant did not comply, Stanton tasered defendant in the chest area. Defendant fell to the ground in the fetal position. The officers patted defendant down and did not find any weapons. The red bag contained pill bottles. The entire incident was recorded on the hospital video recording system and was played for the jury at trial. Defendant was arrested and charged with two counts of resisting or obstructing a police officer, MCL 750.81d(1), and one count of disturbing the peace, MCL 750.170. A jury convicted defendant as charged. Defendant now appeals as of right.

Defendant first argues on appeal that the trial court committed plain error and denied defendant his constitutional right to present a defense by categorically excluding evidence of his good character. We review for an abuse of discretion a trial court's ruling whether to admit evidence. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). An abuse of discretion occurs when a trial court's determination falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We review de novo whether a trial court's evidentiary rulings implicate a defendant's right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

In this case, defendant testified on his own behalf. Defendant testified that he is a minister and is a theology student at Andrews University getting his masters degree. Defendant stated that he suffered severe back injuries while working as a cook at a restaurant in Florida in 2004 that cause him great pain on a daily basis. He testified that he must take pain medication every day to manage the pain. At trial, defendant listed his currently prescribed daily pain medications as Flexeril, Oxycontin, and Neurontin. Defendant stated that the medications affect his ability to perform well in school and make him tired. Defendant stated that on the Wednesday before the Saturday incident occurred at the emergency room, he threw away all of his medications and prayed for deliverance from the pain. Defendant said that despite his prayers and fasting, the pain did not go away and increased without his medication, which is why he had to go to the emergency room. Defendant testified that he does not curse and he is not violent and that this behavior was not in his character.

While defendant was on the witness stand at the very end of his testimony, defendant announced that he had a letter with him from his pastor attesting to his good character. Defendant himself asked the trial court to admit the letter as evidence. The trial court declined to admit the letter and told defendant that he would have to show the letter to defense counsel and defense counsel could move for the letter's admission if he chose to do so. Defense counsel apparently reviewed the letter and did not move for admission of the letter and instead stated that the defense rested. After a discussion regarding the jury instructions, the trial court came back to the issue regarding the letter and stated as follows:

> *Trial Court* [Defendant,] just for your information, sir, letters of reference attesting to your good character are typically not admissible in any trial. If you want to—want the jury to consider a letter attesting to your good character, that you're unlikely to have committed this crime because you're a person of good character, I don't know of any set of circumstances under

> which that would be admissible under the rules of evidence. Do you, [Prosecutor]?
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> *Prosecutor* No.
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> *Trial Court* [Defense Counsel,] do you?
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> *Defense Counsel* No.
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> *Trial Court* All right. So I understand your request for that, sir, but the law just doesn't allow that; the rules of evidence don't permit it. So if you want to discuss that further with [Defense Counsel,] go ahead. I'll recess court and give you the opportunity to do that.
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> We're in recess.

A criminal defendant has a fundamental right to present evidence in his own defense. *People v Unger*, 278 Mich App 210, 249; 749 NW2d 272 (2008). "Although the right to present a defense is a fundamental element of due process, it is not an absolute right. The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Here, the trial court was absolutely correct, the character letter purporting to be from defendant's pastor was not admissible because the letter amounted to inadmissible hearsay evidence. MRE 801(c). MRE 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay evidence is inadmissible unless it comes within an established exception. MRE 802; *People v Eady*, 409 Mich 356; 294 NW2d 202 (1980). Defendant has not set forth an established exception and did not demonstrate that his pastor was unavailable to testify, thus the contents of letter constituted hearsay and the letter was not properly admissible at trial. Therefore, the trial court properly excluded the letter on the basis that it was inadmissible hearsay.

In his brief on appeal, defendant also argues that MRE 405(a)[1] applies to this situation. Indeed, under MRE 405(a), in certain circumstances, a defendant may present favorable character evidence, but it must be in the form of reputation or opinion *testimony*. *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986). And, "MRE 405(a) permits the prosecution's rebuttal to be done either by cross-examining defense character witnesses concerning reports of specific instances of conduct, or by presenting witnesses who testify to the

[1] MRE 405(a) with regard to reputation or opinion states as follows:

> In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct.

bad reputation of the defendant." *Id*. at 130-131. Without regard to the fact that the letter is already inadmissible because it is hearsay, MRE 405(a) does not somehow make the letter admissible. Simply providing the good character letter for jury consideration without making the declarant pastor available for cross-examination does not, at a minimum, furnish the prosecution with its right to inquire of the defense witness. Further, the prosecution would have no opportunity to present its own witnesses to testify to the bad reputation of defendant. Therefore, the trial court properly excluded the letter, *Bauder*, 269 Mich App at 179, and the evidentiary ruling did not implicate defendant's right to present a defense. *Kurr*, 253 Mich App at 327.

Defendant also argues that the trial court's exclusion of evidence that the medication administered at the hospital made defendant confused, denied him his constitutional right to present a defense, and defense counsel was ineffective for not presenting an involuntary intoxication defense. Again, we review de novo whether a trial court's evidentiary rulings implicate a defendant's right to present a defense. *Kurr*, 253 Mich App at 327.

Defendant testified at trial that after receiving the medication combination at the emergency room that he was feeling "dizziness" and had a "light headache." Defendant also testified that the medication "confused" him and made him act "very weird." Also at trial, on three occasions, defendant attempted to testify regarding what his regular doctor told him about how the combination of drugs he received at the hospital could have affected him. Each time the prosecutor objected and the trial court sustained the objection. On appeal, defendant argues that the testimony of defendant's doctor would have been admissible to explain defendant's unusual behavior under MRE 702, MRE 703, and MRE 705. While that may be the case, the trial court was never called on to answer that question because the doctor never testified. Instead, defendant himself repeatedly attempted to relay what he said his doctor told him. That being the case, the trial court properly disallowed the testimony as inadmissible hearsay pursuant to MRE MRE 801(c).

Defendant also argues that Dr. Holbert's testimony opened the door to evidence to rebut the false presumption created by the prosecutor that defendant could not have been confused after receiving the medications in the emergency room. On the date of the incident, defendant received a 60 milligram injection of Toradol and a five milligram injection of Diazepam at 6:26 a.m. At 6:48 a.m., defendant received an additional injection of one milligram of Dilaudid. Dr. Holbert testified at trial that, "[i]n very high doses, Dilaudid and Valium could cause disorientation and confusion; but, certainly not at the dosage that were given that day, no." Again, without deciding whether expert testimony to rebut Dr. Holbert's assertion could have been admissible at trial, we only state that the proper way to attempt to bring in the evidence would have been to call a proper expert witness. In other words, the trial court was never called on to decide whether such expert testimony would be admissible. At trial, defendant only repeatedly attempted to relay what he said his doctor told him with regard to the drugs he was administered in the emergency room and he did not present his doctor or another expert witness. Again, we can only review the actual rulings of the trial court and those concerning hearsay did not constitute error.

Defendant finally contends that his counsel was ineffective for failing to raise the defense of involuntary intoxication. Clearly, the facts of the case show that defendant was well aware of, and voluntarily received, the administration of medication at the emergency room and therefore any intoxication would be voluntary rather than involuntary. Further, under MCL 768.37,[2] defendant was legally precluded from raising a defense of voluntary intoxication because resisting and obstructing a police officer is a general intent crime. *People v VanWasshenova*, 121 Mich App 672, 680; 329 NW2d 452 (1982). Defense counsel is not ineffective for failing to argue a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio

[2] MCL 768.37 states in pertinent part:

> (1) Except as provided in subsection (2), it is not a defense to any crime that the defendant was, at that time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound.
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> (2) It is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a preponderance of the evidence, that he or she voluntarily consumed a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired.